No. 8857

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
JENNIE R. BUCKLEY,
Bankrupt.

BAKERSFIELD ABSTRACT COMPANY,
Appellant,

vs.

JENNIE R. BUCKLEY,
Appellee,

and

WILLIAM H. CLENDENEN,
Appellant,

vs.

JENNIE R. BUCKLEY,
Appellee.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX.

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OPENING BRIEF OF APPELLANT BAKERSFIELD ABSTRACT COMPANY.

Statement of the Case.

This is an appeal from an order of the District Court affirming an order of a referee in bankruptcy after review by the District Court of the record of a summary proceeding initiated by an order to show cause. This appeal arises out of a proceeding in bankruptcy under Section 75, Bankruptcy Act (11 U. S. C. A., Sec. 203).

This Court has appellate jurisdiction of the appeal under Section 24B of the Bankruptcy Act.

The appellants, Bakersfield Abstract Company, a corporation, and William H. Clendenen, have heretofore filed petitions for the allowance of their appeals. [Tr. 54-62.] This Court has heretofore made its order allowing the appeals. [Tr. 68.]

On October 28, 1938, Jennie R. Buckley, the appellee, and J. A. Buckley and Gladys Buckley, executed a promissory note secured by a deed of trust upon real property located in Kern County, California, and owned by Jennie R. Buckley as her separate property. [Tr. 107.] The appellant, William H. Clendenen, was one of the payees named in said note and one of the beneficiaries named in said deed of trust. J. A. Buckley and Gladys Buckley have not appeared in the proceedings had in the courts below in connection with the affairs of the appellee.

The trustee named in said deed of trust was the appellant, Bakersfield Abtsract Company, a corporation, organized and doing business under the laws of the State of California. [Tr. 10.]

During the year 1937 the appellee failed to perform the covenants and to meet the obligations set forth in her promissory note and in the deed of trust, and appellee thereby permitted a condition of default, as defined in those instruments, to arise and remain uncured. [Tr. 11.]

Subsequent to the occurrence of the default, and while the default remained uncured, the appellant, William H. Clendenen and Mamie L. Clendenen, the beneficiaries named in the deed of trust and the payees named in the promissory note, proceeded to have the trusts set forth therein become active and to have the trustee commence the exercise of its powers and duties for the purpose of bringing about a trustee's sale of the property described in the deed of trust, in order to provide funds with which

to satisfy the obligations expressed by the promissory note and to satisfy other obligations secured by said deed of trust. [Tr. 11.]

After the appellant, Clendenen, had delivered to the appellant, Bakersfield Abstract Company, a notice of default and demand that the property be sold, and after the appellant, Bakersfield Abstract Company, had caused such notice of default to be recorded in the office of the recorder of the county in which the property described in the deed of trust was situated [Tr. 12-13], the appellee filed a petition for a composition of her debts, as authorized and provided for by the provisions of Section 75 of the National Bankruptcy Act, as amended in 1935.

The appellee was unable to effect a composition with her creditors and she subsequently filed a petition praying that she be adjudicated a bankrupt and that her estate be administered under the provisions of Subdivision S of Section 75 of the National Bankruptcy Act, as amended in 1935. [Tr. 4-6.]

Upon the filing of the petition under Subdivision S, the District Court made its order of adjudication [Tr. 4], and, without appellant Bakersfield Abstract Company having any knowledge of the making thereof, included in said order a further order enjoining and restraining all creditors of the bankrupt from commencing or maintaining any judicial or official proceedings in any court, or under the direction of any official against the said bankrupt, and from proceeding with any sale of the bankrupt's property under the terms of any deed of trust, until further order of the Court. [Tr. 5.]

Subsequent to the making of said order of adjudication the appellant, Bakersfield Abstract Company, held its trustee's sale, and the property was purchased at

that sale by the appellant, William H. Clendenen and Mamie L. Clendenen. [Tr. 6.]

After the trustee's sale the appellee filed a petition with the referee in bankruptcy alleging the making of the order of adjudication and the restraining order herein referred to, alleging the sale under the deed of trust, and praying that an order be made directed to the appellants, Bakersfield Abstract Company and William H. Clendenen, to show cause why the trustee's sale should not be set aside and why the trustee's deed issued by the appellant, Bakersfield Abstract Company, should not be declared null and void. [Tr. 6.]

The allegations made in appellee's petition for order to show cause were met and denied by affidavit [Tr. 10] and by answer [Tr. 14] of the appellant, Bakersfield Abstract Company. Upon the hearing before the referee on the order to show cause, the referee made an order setting aside the trustee's sale and declared the trustee's deed which had been executed by the appellant Bakersfield Abstract Company to be null and void. [Tr. 41.]

The appellants, within the time allowed by law, filed their petition for review in the District Court. [Tr. 41.] The petition for review of the order of the referee was heard and argued before the District Court and was affirmed by the District Court. [Tr. 53.]

The appellant, Bakersfield Abstract Company, has contended at all times that it did not have notice or knowledge of the restraining order made by the District Court; that the injunctive or restraining order was not operative upon it for the reason that appellant was without notice or knowledge of the restraining order; that the restraining order of the District Court was prematurely made and was without the authority of the statute, for the reason that certain conditions prescribed in paragraph 2

of Subdivision S of Section 75 of the National Bankruptcy Act had not been met at the time the restraining order was made.

Pursuant to stipulation and order duly made and contained in the files of the clerk of this Court, the appeals of the appellants, Bakersfield Abstract Company and William H. Clendenen, are presented and based upon one transcript of record.

Specification of Errors.

I.

The Court erred in finding and holding in effect that the restraining order contained in the order of adjudication was notice or a caveat to all persons, or to interested persons, or to persons having existing titles or claims in the property of the bankrupt [Tr. 59], and was sufficient to stay and enjoin this appellant and sufficient to enable the referee, upon a summary hearing, to set aside acts and instruments of this appellant, although this appellant was without knowledge of the making or the existence of the stay order.

II.

The Court erred in finding and holding in effect that an active trustee under a deed of trust, ignorant of a restraining order the existence of which was asserted to have been known by the beneficiary, is charged with knowledge of such restraining order. [Tr. 60.]

III.

The Court erred in finding and holding in effect that the restraining order granted after the debtor had filed a petition under Section 75(s) of the Bankruptcy Act was valid and in thereby not recognizing the fact that the provisions of the act permitting such an order had not been complied with by the appellee. [Tr. 60-61.]

ARGUMENT.

The Restraining Order Contained in the Order of Adjudication Was Not a Caveat to Appellant.

The restraining order which has given rise to proceedings before the referee and to this appeal is included in the order of the District Court declaring and adjudging the appellee a bankrupt. [Tr. 4-5.]

Knowledge by appellant of the bankruptcy adjudication and of the restraining order is not alleged by the bankrupt in her petition for order to show cause [Tr. 6-7], and knowledge thereof was denied by appellant in its affidavit [Tr. 10-13] and in its answer to the order to show cause. [Tr. 14-17.] Actual knowledge was not made the basis for the order of the referee [Tr. 41-44], which order was confirmed and amplified by the District Court. [Tr. 53.] Appellant urges that the restraining order contained in the order of adjudication of December 13, 1937, was not a caveat to appellant, nor was appellant charged with constructive notice of such restraining order upon the making of the order adjudging appellee a bankrupt.

Appellant urges that it is and was at all times herein mentioned a person or entity interested in and having a substantial claim of lien upon or title to the property affected by said proceedings because appellant, as a trustee under a deed of trust by which instrument title was conveyed to it, has a substantial claim of lien upon or title to the property. From the fact that summary proceedings were had to set aside a deed executed by appellant, it necessarily follows that appellant had a substantial claim of lien upon or title to the property. The order of adjudication was, therefore, not a caveat to appellant. Appellant's contention is sustained by authority.

The case of *In re Rathman,* 183 Fed. 913, had to do with the effort of a bankruptcy trustee to obtain possession of property through a summary proceeding. Possession of the property had been lost by the bankrupt in a mortgage foreclosure action through a decree rendered after adjudication. In answer to the contention that the filing of the petition in bankruptcy was a caveat to all the world and in effect an attachment, the court said, at page 924:

> "(5) But counsel insist here that the filing of the petition in bankruptcy 'is a caveat to all the world and in effect an attachment and injunction,' and they cite Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405, and the numerous opinions of the courts that repeat this statement. But the later decisions of the Supreme Court adjudge that *this statement applies only to parties who have no substantial claim of a lien upon or a title to the property of the bankrupt, and that, against those who have such claims of existing liens or titles when the petition in bankruptcy is filed, that filing is neither a caveat nor an attachment,* that it creates no lien, and that until the bankruptcy court by some act of one of its officers takes actual possession of the property, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles, and remedies are unaffected thereby, and they are strangers to the proceeding. Jaquith v. Rowley, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. Ed. 620; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 353, 26 Sup. Ct. 481, 50 L. Ed. 782; Hiscock v. Varick Bank of New York, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. Ed. 945." (Italics ours.)

The court in the matter of *In re Geister* (D. C.), 97 Fed. 322, in considering an application in a bankruptcy matter for an order staying an action against the bankrupt in a state court, pointed out the lack of jurisdiction of the bankruptcy court over creditors of a bankrupt who were without notice of the bankruptcy. At page 323 it was said:

> "The proper practice to be followed in this class of cases is to make the application to the court wherein the action sought to be stayed is pending, and it is the duty of that court, whether it be state or federal, to grant a stay according to the provisions of the bankruptcy act. . . .
>
> "The rule thus announced under the provisions of the act of 1867 is clearly applicable to section 11 of the act of 1898 (11 U. S. C. A., Sec. 29), and points out the course to be pursued in cases like that now under consideration. The bankrupt who is the defendant in the state court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy will become the duty of the state court to grant the stay prayed for. Not only is this the proper method of bringing to the judicial notice of the state court the fact that proceedings in bankruptcy have been instituted, and therefore the bankrupt has a right to a stay of the case until the question of a discharge can be heard, but it is also the proper procedure, for the reason that the creditors, who are the plaintiffs in the suit sought to be stayed, are parties to the action in the state court, are within its jurisdiction, and will therefore be bound by its action in the premises, *whereas they are not now subject to the jurisdiction of this court, as they have*

not been notified of the filing of this petition now before the court, nor in any way brought within the actual jurisdiction of this court. For these reasons the prayer of the petition is refused, on the ground that the application for a stay should be made in the state court in which the case is pending." (Italics ours.)

The filing of a petition in bankruptcy is not a caveat to persons having substantial claims of existing titles to or liens on the property of the bankrupt. Authority for this statement is found in *Fidelity Trust Co. v. Gaskell,* 195 Fed. 865 (C. C. A.), 28 A. B. R. 4, wherein the court said:

"It is true that the Supreme Court once said that the filing of a petition in bankruptcy is a caveat to all the world and in effect an attachment and an injunction. . . . But the later decisions of that court adjudge that the statement quoted applies only to parties who have no substantial claim of a lien upon or title to property claimed as that of the bankrupt *and that against those who have such claims of existing titles or liens when the petition in bankruptcy is filed its filing is neither a caveat nor an attachment,* that it creates no lien and that they are strangers to the proceedings in the absence of an order or process making them parties, or some equivalent notice." (Italics ours.)

Further authority for the contention that the filing of the petition in bankruptcy was not a caveat to appellant is found in the statement of the court in the matter of *In re Locust Building Co., Inc.,* 299 Fed. 756 (C. C. A., N. Y.), 3 A. B. R. (N. S.) 144:

"The filing of a creditors' petition praying for an adjudication in bankruptcy is no doubt a caveat to

> all the world. It had, as the court declared in Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866, 867, the effect of an attachment and injunction. . . . That doctrine is not questioned in this case. But it has no application to the facts herein involved. *The statement that the filing of the petition is a 'caveat to all the world' applies only to parties who have no substantial claim of a title to the property of the bankrupt, or of a lien thereon when the petition in bankrupty is filed.* As to them the filing of the petition is neither a caveat nor an attachment and creates no lien and they are unaffected by it at least until the bankruptcy court takes actual possession of the property or in some way makes the claimants parties to the proceeding." (Italics ours.)

Appellant urges that the effectiveness or operation of any restraining order is predicated upon notice of its contents being made known to those persons whose acts are sought to be stayed.

Bankruptcy courts recognize and follow the rules and practices of courts of equity.

> "It is well settled that bankruptcy proceedings themselves are purely equitable in their character."
>
> *Westall v. Avery,* 171 Fed. 626.

An important principle recognized by equity courts is that in order to bring a person within the scope of an injunctive order he must have had knowledge of such order. Appellant urges that the order of the District Court, if not here reversed, approves a departure from this important equity rule by affirming a ruling that appellant was subject to the restraining order which was unknown to it.

Absence of Knowledge of an Injunctive Order Bars Punishment for the Violation of the Order. The Same Rule Should Apply Where the Court Declares Null and Void the Acts of One Who Was Without Knowledge of the Injunctive Order.

The proceedings before the Referee in Bankruptcy were to set aside appellant's acts as a trustee under a deed of trust. No suggestion or contention was made by the Referee in Bankruptcy, or by appellee, that appellant was subject to punishment for contempt. Whether the result of acts, which acts the Court through a restraining order has declared should not be done, is punishment for contempt, or whether the Court declares that certain acts or instruments are a nullity, the Court should require that it be shown that the person asserted to have violated the restraining order, had knowledge of the order.

Appellant relies upon certain authorities which state the rule that before one can be punished for contempt he must have had notice of the order he is claimed to have violated.

In 32 *Corpus Juris, Injunctions,* page 486, Sec. 841, it is said:

> "One cannot be punished for violating an order of injunction, unless it is made to appear *that such order was personally served upon him, or that he had notice of the making of such order.* Where, however, a party has *actual notice* of an injunction, clearly informing him from what he must abstain, he is bound by the injunction *from that time,* and will be punished for a violation thereof, although it may not have been served, or be defectively served on him. It is altogether immaterial how defendant acquires the information of the existence of the injunction; *when once he has been apprised* of the fact he is legally

bound to desist from what he is restrained and inhibited from doing. Where an injunction has been ordered, a party having knowledge of that order, who deliberately violates the injunction that has been ordered, although not yet issued, is guilty of contempt of court; but, in order to convict of contempt, *it must be shown clearly that the party had knowledge* of the order for the injunction in such a way that it can be held that he understood it, *and with that knowledge* committed a willful violation thereof." (Italics ours.)

The record is silent as to appellant's having had knowledge of the restraining order prior to the service upon it of the order to show cause. Appellant made sworn denials that it had knowledge of the restraining order prior to the service of the order to show cause. The Referee in Bankruptcy, at the time of the hearing of the order to show cause, admitted that because appellant was without knowledge he could not punish appellant for contempt. [Tr. 28.]

In *Harris v. Hutchison,* 160 Iowa 149, 140 N. W. 830, 44 L. R. A. (N. S.) 1035, the lower court had made an order punishing a person for contempt for violation of an order of which that person had no knowledge. The Supreme Court of the state, in reversing the lower court said:

> *"It has never been held by any court that a party can be punished as for contempt in the violation of the terms of the decree of court, without either notice*

or knowledge of the existence of the decree. Courts are ever as watchful of the rights of the citizen as of the state, and it must be borne in mind that the same power that made the law that punished made also the law that protects. . . .

"In considering and determining this case, we must also bear in mind that this petitioner, Harris, was not a party to the suit in which the decree was rendered. We must also bear in mind that, in the proceeding against him for contempt, it was shown, and the court so found, *that Harris had no actual knowledge of the existence of the decree during any of the time prior to his arrest for contempt.* We lay down these principles as fundamental and established by authority, both in this country and in England.

"1. A person cannot be in contempt of an order, injunctional or otherwise, unless he is shown to have been served with such order, or to have had actual notice of its issuance, or unless he has, at the time of the commission of the act charged as contempt, personal knowledge of the injunctional order. It has been held that when a party is present in court at the time the order is made, and hears the same pronounced, he is bound by the order the same as if he had been actually served with the writ. See Milne v. Van Buskirk, 9 Iowa 558; Hawks v. Fellows, 108 Iowa 133, 78 N. W. 812; 10 Enc. Pl. & Pr. 1101; Coffey v. Gamble, 117 Iowa 545, 91 N. W. 813. But nowhere has it been held that one who was not a party to the proceedings in which the injunctional

order was entered, *and who had no notice or knowledge of the existence of the injunctional order, actual or constructive,* can be punished as for contempt in the doing of the thing prohibited by the order, even though the decree in itself is broad enough to cover and include the act charged, *and broad enough in its intent and purpose and in its injunctional force to include parties other than the immediate parties to the suit in which the order was entered.* . . .

"Every man is presumed to know the law; but we know of no authority for holding that every man is presumed to know the scope, purpose and intendment, or even the existence, of decrees entered by every court in causes to which he was not a party. *No man is ever presumed to know that which, from the very nature of the thing itself, it was not his duty to know, and no reason exists why he should know.*

"The servant of the master is not presumed to know that which affects his master's title in and to his master's property, or that which affects the master's right to the use and occupancy of his property, because it was not his duty to know, and no reason exists why he should know. A party dealing with real property is presumed to know, when the same is a matter of record, that which affects the title, or the right to the use, occupancy, or enjoyment of the property. These principles are elementary." (Italics ours.)

Appellant urges that it should not have been held bound by an injunctive order which was unknown to it, and that it was error for the Court to declare appellant's acts and trustee's deed to be null and void and of no effect.

A Trustee Under a Deed of Trust, Upon Becoming an Active Trustee, Is Not Subject to Control or Direction by the Beneficiary in the Exercise of Trust Powers and Such Active Trustee Is Not an Agent of the Beneficiary.

Appellant, in effect, has been charged with constructive notice of the restraining order because of knowledge of such order asserted to have been had by the beneficiary under the deed of trust. Such a conclusion of law ignores the effect of a declaration or notice of default upon the powers and duties of the trustee under a deed of trust, and ignores the active nature of the trust following the commencement of sale proceedings.

In the instant matter appellant undertook the performance of its duties as trustee prior to the filing of the appellee's petition for a composition of her debts under Section 75 of the Bankruptcy Act.

When appellant was called upon by the beneficiary to exercise its powers as trustee, it became obligated to fulfill and discharge duties to the beneficiary and to the trustor in accordance with the provisions of the deed of trust. No longer was appellant a passive trustee, and under no circumstances could either or both the trustor or beneficiary dictate to it the manner in which it performed its duties. Appellant cannot be said to be an agent of either the beneficiary, or the trustor, or both, when neither of them can control, regulate, or direct the time or manner of the exercise of its trust powers. An agency status does not exist if an entity vested with the power to perform acts in its own discretion is subject to no regulation or

control by those who are claimed to be principals, and if the asserted agent is doing acts which they are not capable of performing.

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control,* and consent by the other so to act." (Italics ours.)
>
> *Restatement of the Law, Agency, American Law Institute,* Sec. 1, page 7.

> "The fundamental idea of agency has its conception in something lawful that a person may do, and a delegation by such person to another of the power lawfully to do that thing."
>
> *Brutinel v. Nygren,* 154 Pac. 1042, 1045, 17 Ariz. 491.

> "Where no control is given, the relationship of principal and agent cannot exist."
>
> *F. C. Adams, Inc., v. Elmer F. Thayer Estate* (N. H.), 155 Atl. 687; affirmed *Adams, Inc., v. Thayer's Estate,* 156 Atl. 697, 85 N. H. 177.

Appellant urges that the lower court, in order to charge appellant with knowledge of the restraining order, adopted a strained designation of the trustor, the beneficiary, and the trustee, as parties to an agency relationship; that the lower court used its strained designation of the trustor, the beneficiary, and the trustee as a basis for its application of the rule that knowledge of the agent is imputed to the principal, for the purpose of charging the agent with constructive knowledge of information had by the principal.

The Conditions Specified by Section 75, Subsection (S) of the Bankruptcy Act (11 U. S. C. A. 203) Must Be Met Before the District Court May Make the Order Staying Judicial Proceedings or the Enforcement of Liens on the Bankrupt's Property.

Subsection S of Section 75 of the Bankruptcy Act, after enabling the debtor to amend his petition to ask to be adjudged a bankrupt, provides that

> "Such farmer may, at the same time or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by state law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section."

Further provision is then made for the making of the appraisals, the setting aside of the unencumbered exemptions, and for the making of an order that possession of the remainder of the debtor's property remain in the debtor.

The next succeeding provision of the statute provides:

> "(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under

the direction of any official, against the debtor or any of his property, for a period of three years."

At the time the District Court made its order adjudging appellee to be a bankrupt, which order of adjudication contained the restraining order, no appraisal had been made of the debtor's property, and her unencumbered exemptions had not been set aside to her. Such appraisal had not been made, nor had her unencumbered exemptions been set aside to her at the date upon which appellant conducted its trustee's sale, fourteen days after the making of the restraining order.

Appellant assumes that a creditor may foreclose upon the property of a bankrupt by non-judicial sale under a deed of trust without permission of the court that has the control and supervision of the bankruptcy. Such is the effect of decisions of this Court in the following cases:

Hardt v. Kirkpatrick, 91 Fed. (2d) 875, 878, 879;

Heffron v. Western Loan and Building Co., 84 Fed. (2d) 301, 303; certiorari denied 299 U. S. 597, 57 S. Ct. 189, 81 L. Ed. .....;

Robinson v. Kay, 7 Fed. (2d) 576;

In re Smith, 3 Fed. (2d) 40.

In *Hardt v. Kirkpatrick,* 91 Fed. (2d) 875, the facts, as in the instant case, arose out of the exercise of the power of sale contained in a deed of trust. There, as in the present matter, the debtor had removed herself from the effect of Subsection (O) of Section 75 of the Bank-

ruptcy Act. In that decision, in answer to the contention of the bankrupt that the foreclosure by non-judicial sale was invalid for having been made without permission of the District Court, this Court said:

> "(5) Subsection (S) contains no clause that would deprive the appellant, under the facts of this case, of the right of proceeding with a non-judicial sale under his deed of trust. It is true that paragraph 2 of that subsection provides that 'When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years.' Among the 'conditions' named in the same subsection, in paragraph 1, are the appraisal of the debtor's property and the setting aside of the debtor's unencumbered exemptions, etc. *These conditions, so far as the record before us discloses, have not been met in the instant case.*" (Italics ours.)

Following this statement the Court pointed out the absence of any provision in Section 75 (S) to prevent the exercise of the power of sale under the deed of trust. Reference was then again made to the staying of the sale by order of the court (page 878):

> ". . . in the absence of a court order staying such sale. . . ."

Appellee, having been aware of the impending sale under the terms and provisions of the deed of trust [Tr. 11, 12, 13], might have proceeded to preserve her estate

by obtaining a temporary restraining order returnable at a fixed time and place. After service of such an order and at the time and place therein fixed for hearing, all persons then appearing would have had an opportunity to be heard and the Court could at such time make such other and further orders as would be deemed necessary to accomplish the purposes set forth in the Bankruptcy Act in the manner therein set forth.

A temporary restraining order made and granted without notice, having no fixed return date and purporting to be effective without limitation as to time, is an unwarranted exercise of the inherent power of the Court to use this extraordinary remedy. Appellee should not be heard to complain if she has not brought herself within the scope and protection of Subsection S of Section 75 of the Bankruptcy Act, for the reason that appellee could have obtained relief through a proper exercise of the power of the Court to preserve her estate.

In the matter now before this Court the District Court did make an order staying the exercise of the power of sale contained in any deed of trust affecting the appellee's property.

Appellant contends, nevertheless, that the order made by the District Court providing for a stay of the exercise of the power of sale contained in the deed of trust affecting appellee's property, was not an order of the character said by this Court to be sufficient to stay the exercise of the power of sale.

It was not an order made after the meeting of the conditions above referred to, for the reason that the conditions had not been met, and this Court said, in *Hardt v. Kirkpatrick, supra,* in reference to the District Court's statement that to approve a non-judicial sale made without permission of the Court would amount to a flaunting of the power of the Bankruptcy Court:

> "We cannot concur in this view. Section 75 (S) of the Bankruptcy Act itself provides a direct and orderly means by which the court can prevent any such flaunting—the simple expedient of issuing a stay against the lienor's sale. Not having seen fit to do this, the District Court cannot complain of the flaunting of an authority that it did not choose to exercise."

Appellant respectfully urges that the restraining order made by the District Court was not one made in the exercise of the direct and orderly means provided by Section 75 (S). If that statute governs the method and means of staying the non-judicial sale, those means have there been made available only upon conditions which have not been undertaken or met by appellee.

For the reasons above set forth appellant respectfully urges that the order appealed from be reversed and the District Court be directed to make its order in favor of the appellant Bakersfield Abstract Company herein, setting aside the order of the referee in bankruptcy.

Respectfully submitted,

Wm. H. B. Haymond,

Counsel for Appellant Bakersfield Abstract Company.

No. 8857

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Appellee.

OPENING BRIEF OF APPELLANT WILLIAM H. CLENDENEN.

The statement of the case made by the appellant, Bakersfield Abstract Company, is deemed by this appellant to be appropriate for the purposes of his appeal.

Specification of Errors.

I.

The Court erred in finding and holding, in effect, that the restraining order contained in the order of adjudica-

tion was notice or a caveat to all persons, or to interested persons, or to persons having existing titles or claims in the property of the bankrupt. [Tr. 66.]

II.

The Court erred in finding and holding, in effect, that the restraining order granted after the debtor had filed a petition under Section 75(s) of the Bankruptcy Act was valid and in thereby not recognizing the fact that the provisions of the act permitting such an order had not been complied with by the appellee. [Tr. 67.]

ARGUMENT.

Pursuant to stipulation by and between the appellant Bakersfield Abstract Company and the appellant William H. Clendenen, an order was made by this Court on August 15, 1938, permitting said appellants to file a consolidated opening brief in the above-entitled matter, and permitting the appellant William H. Clendenen to join in the brief of the appellant Bakersfield Abstract Company and to adopt for his opening brief upon this appeal the argument of the appellant Bakersfield Abstract Company upon its first and third specifications of error.

For the reasons above set forth appellant respectfully urges that the order appealed from be reversed and the District Court be directed to make its order in favor of the appellant William H. Clendenen herein, setting aside the order of the referee in bankruptcy.

Respectfully submitted,

OSBORN & BURUM,

By ROY BURUM,

Counsel for Appellant William H. Clendenen.